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No. 88-293

In the Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.,
PETITIONERS

v.

JAMES EARL REID

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE REGISTER OF COPYRIGHTS AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether under the "work made for hire" provisions of the Copyright Act of 1976, 17 U.S.C. 101 and 201(b), petitioners own the copyright in a statue made by respondent at petitioners' request and expense and under petitioners' supervision and control.

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INTEREST OF THE AMICUS CURIAE

This case presents an important and recurring question concerning the meaning and application of the "work made for hire" provisions of the Copyright Act of 1976, 17 U.S.C. 101 *et seq.* The Copyright Office, a branch of the Library of Congress, is generally responsible for discharging "[a]ll administrative functions and duties" under the Copyright Act (17 U.S.C. 701(a)). The Copyright Office took a principal role in drafting the work-made-for-hire provisions – including, as this Court recognized more generally in *Mills Music, Inc.* v. *Snyder,* 469 U.S. 153, 159-160 (1985), "authorizing * * * studies"; "conduct[ing] numerous meetings with representatives of the many parties that the copyright law affected"; "issu[ing] a preliminary draft revision bill"; "submitt[ing] [a] 1965 draft revision bill"; and "prepar[ing] a supplementary report to accompany the 1965 draft revision bill." In addition, pursuant to 17 U.S.C. 105, "work[s] of the United States Government" are treated, for copyright purposes, in the same way as "works made for hire" under 17 U.S.C. 101. See H.R. Rep. No. 1476,

94th Cong., 2d Sess. 58 (1976). The United States therefore has a direct programmatic interest in the construction of the work-made-for-hire provisions. Finally, this Court has previously invited the Solicitor General to express the views of the United States in *Easter Seal Society For Crippled Children & Adults of Louisiana, Inc.* v. *Playboy Enterprises, Inc.*, 815 F.2d 323 (5th Cir. 1987), cert. denied, No. 87-482 (Mar. 28, 1988), a case that raised the same legal issue as this case.

STATEMENT

A. The Statutory Framework

Under the Copyright Act of 1976 (the Act), 17 U.S.C. 101 *et seq.*, the copyright in a work "vests initially in the author or authors of the work" (17 U.S.C. 201(a)). In the case of so-called "works made for hire," "the employer or other person for whom the work was prepared is considered the author" and, "unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright" (17 U.S.C. 201(b)).

The Act defines two categories of works that constitute "works made for hire" (17 U.S.C. 101). One category, defined in Subsection (1), includes works "prepared by an employee within the scope of his or her employment."[1] The other, defined in Subsection (2), includes works "specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

B. The Present Controversy

1. Petitioner Community for Creative Non-Violence (CCNV) is a Washington, D.C.-based non-profit association

[1] The Copyright Act contains no definition of the terms "employee" or "scope of employment." 1 M. Nimmer, *Nimmer on Copyright* § 5.03[B][1], at 5-12 (1987).

devoted to the welfare of homeless persons. In the fall of 1985, CCNV decided to participate in the annual Christmas Pageant of Peace in D.C. by sponsoring a display that would dramatize the plight of the homeless. CCNV, together with its agent and trustee Mitch Snyder, also a petitioner, conceived the idea for a modern Nativity scene which would depict, in place of the traditional Holy Family, a homeless family huddled atop a city steam grate. The family was to be black; the figures were to be life-sized; and the steam grate was to be placed atop a pedestal containing special effects equipment that would emit artificial steam to swirl about the figures. CCNV also designated the name "Third World America" for the work, and settled upon a legend for the pedestal—"and still there is no room at the inn." Pet. App. 3a.

Synder contacted respondent, James Earl Reid, a Baltimore sculptor, whom Snyder had never met before. In the course of two telephone calls in October 1985, the two men reached an agreement. Respondent promised to sculpt the three human figures for "Third World America" and a shopping cart for their belongings; he also agreed to use a synthetic substance called "Design Cast 62" that could be tinted to resemble bronze. CCNV assumed responsibility for the steam grate and the pedestal. For a total outlay of approximately $7,000-$8,000, CCNV engaged a cabinet maker to construct the pedestal, obtained the special effects equipment, and acquired the chemicals to produce the simulated steam. The parties agreed that respondent's portion of the sculpture would cost no more than $15,000, not counting respondent's own services, which he donated to the project. Respondent agreed to deliver the work by December 12 for attachment to the base. Neither party mentioned copyright. Pet. App. 3a-4a; 2/2/87 Tr. 36-37, 141.

Respondent and his assistants worked on the figures throughout November and December, conferring periodically with CCNV and making changes to accommodate petitioners' requests. On December 24, 1985, respondent delivered his portion of "Third World America" to the District of Columbia, where it was joined to the steam grate pedestal and placed on display near the site of the Pageant. At that time, respondent

received $3,000 from Snyder, the final installment of the $15,000 total payment due him under the agreement. Pet. App. 4a.

In late January 1986, CCNV sent the entire sculpture to respondent so that he could repair damage to the foot of the male figure. The following month, CCNV began making plans to take the sculpture on a tour of several cities to raise money for the homeless. Respondent objected to the proposed tour, contending that the Design Cast 62 material was too delicate to withstand the trip. He urged CCNV to cast the sculpture in bronze or to have a "master mold" made. CCNV refused, but invited respondent to do so at his own expense. Pet. App. 4a.

In March 1986 CCNV asked respondent to return the sculpture. Respondent refused. Instead, respondent filed an application for copyright registration for "Third World America" in his own name on March 20, 1986, and announced his own plans to take the sculpture on an exhibition tour that was less ambitious than the one proposed by petitioners. Snyder filed a competing application for copyright registration in his name on May 21, 1986. Pet. App. 4a-5a.

2. On June 2, 1986, petitioners commenced this litigation against respondent, seeking return of the sculpture and a determination of copyright ownership. Pet. App. 5a. The district court entered judgment in favor of petitioners (*id.* at 29a-36a). The court concluded that the sculpture was a "work made for hire" pursuant to Subsection (1) of the definition in 17 U.S.C. 101, which applies to works "prepared by an employee within the scope of his or her employment." The court reasoned that "for statutory copyright purposes generally, the employment relationship giving rise to a copyright is somewhat more expansive than the master-servant relationship found in the common law of agency" (*id.* at 34a-35a). In particular, the court held, "[i]f the putative 'employer' was either the 'motivating factor' in the production of the work, or possessed the right to 'direct and supervise' the manner in which the work was done, the copyright is his no matter the degree of creative license actually exercised by the artist-employee" (*id.* at 35a). On this record, the court concluded, "[i]t is indisputable * * * that [petitioners

were] the motivating factor in the procreation of 'Third World America.' " (*ibid.*).

3. The court of appeals reversed (Pet. App. 1a-28a). Relying on the Fifth Circuit's decision in *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc.* v. *Playboy Enterprises, Inc.*, 815 F.2d 323 (1987), cert. denied, No. 87-482 (Mar. 28, 1988), the court of appeals stated that Section 101 creates "a simple dichotomy * * * between employees and independent contractors" (Pet. App. 13a (citation omitted)). In particular, the court explained, Subsection (1) applies whenever the creator of the work is an employee, as defined by principles of agency law; Subsection (2), the court continued, applies whenever, under agency principles, the work's creator is an independent contractor. Thus, the court held (Pet. App. 19a (emphasis in the original)), if a work is created by an independent contractor, it is governed by Subsection (2) and therefore cannot be a work made for hire unless it "falls within one of the specific categories enumerated in [Section] 101(2) *and* 'the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.' " Applying that approach, the court of appeals held that "Third World America" was not a work made for hire. It explained that respondent "was an independent contractor and not an employee of CCNV within the rules of agency law" (Pet. App. 19a).[2] The court accordingly held that Subsection (2) applied; and under that provision, the court concluded, "sculpture surely is not a category of commissioned work enumerated" and "no written agreement existed between [petitioner] and [respondent]."[3]

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[2] In this connection, the court of appeals noted (Pet. App. 19a n.11) that respondent had "donated his services, worked in his own studio, and personally engaged assistants when he needed them." Moreover, the court observed (*ibid.*), "[c]reating sculptures was hardly 'regular business' for CCNV."

[3] The court remanded the case for a determination whether petitioners and respondent may be "joint authors" of the copyright in the sculpture, as well as for a determination whether other persons who had assisted in the project might likewise have a claim of joint authorship in the copyright. Pet. App.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, defines two categories of works that may qualify as works made for hire (17 U.S.C. 101). Subsection (1) covers works prepared by an "employee within the scope of his or her employment." Subsection (2) covers works that are "specially ordered or commissioned" for use in one or more of nine categories, provided that there is a written agreement, signed by the parties, designating the work as one made for hire.

It is common ground (see Pet. Br. 14) that "Third World America" does not meet the work-made-for-hire requirements under Subsection (2). That is true for two independent reasons: first, because statues do not fall within any of the categories enumerated in Subsection (2); and second, because the parties did not execute a written agreement concerning "Third World America." Petitioners contend (Br. 14), however, that Subsection (2) does not apply to commissioned works that are prepared under the close supervision of the hiring party, as was the case with the creation of "Third World America." Such commissioned works, petitioners maintain, should be regarded as works produced by an "employee within the scope of his employment," and therefore as a work made for hire under Subsection (1).

Petitioners thus appear to endorse the Second Circuit's decision in *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F.2d 548, cert. denied, 469 U.S. 982 (1984). The court of appeals con-

19a-28a. Those issues are not presented by the petition. We note, however, that petitioners address the joint authorship issue at some length in their brief (at 30-32), contending that the court of appeals' view of joint authorship would permit an excessive "fractionalization of copyright" (Br. 30). We agree with petitioners that the court of appeals embraced an overly-expansive concept of joint authorship. Congress clearly intended to restrict, rather than expand, the joint-authorship doctrine as it had been articulated under the pre-1976 Act case law. See *Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill*, 89th Cong., 1st Sess. 65 (Comm. Print 1965). Moreover, we do not believe, as petitioners seem to suggest, that our construction of the statute requires a similarly expansive view of joint authorship claims. In any event, the question of joint authorship is not presented to this Court for its review.

cluded in that case that "there is no indication in the legislative history or elsewhere" that Congress intended Subsection (2) to cover commissioned artists who are "actually sufficiently supervised and directed by the hiring party to be considered 'employees' acting within 'the scope of employment' " (*id.* at 552). The Seventh Circuit subsequently adopted the same position in its decision in *Evans Newton Inc.* v. *Chicago Systems Software*, 793 F.2d 889, cert. denied, 479 U.S. 949 (1986).

The court below, following the Fifth Circuit's decision in the *Easter Seal* case, took a different approach. It held that Subsection (1) applies only to "employees" as defined by agency law principles, while Subsection (2) applies only to "independent contractors" as defined by agency law. Applying agency principles in the present case, the court concluded that "Third World America" was the work of an independent contractor, and that it was therefore subject to Subsection (2). Under that provision, the court held, the statue is not a work made for hire.

More recently, the Ninth Circuit has articulated a third view of the work-made-for-hire provisions. *Dumas* v. *Gommerman*, No. 87-6542 (Jan. 13, 1989).[4] After reviewing the statutory language and legislative history, that court concluded that "[o]nly the works of formal, salaried employees" are covered by Subsection (1), while *all* commissioned works, regardless of the supervision and control of the hiring party, must meet the work-made-for-hire criteria of Subsection (2). Slip op. 312, 317-318. The court rejected (*id.* at 317-318) the proposition that the work of an independent contractor may be encompassed within Subsection (1), explaining that "the drafters wanted a bright line between employees and independent contractors" (*id.* at 318).

We agree with the Ninth Circuit. The language, history, and purposes of the work-made-for-hire provisions make clear that Subsection (1) applies only to works produced by regular, salaried employees, while Subsection (2) applies to *all* commissioned works, regardless of whether the hiring party has exercised control over the creative process. "Third World America" is therefore governed exclusively by Subsection (2); and since it

[4] We have lodged copies of the *Dumas* case for the convenience of the Court.

does not meet the work-made-for-hire criteria under that provision, respondent, not petitioners, owns the copyright in the statue.

A. This result is compelled by the text of the Copyright Act. Subsection (2) applies to any "specially ordered or commissioned" work, not just to those works prepared without close supervision. By contrast, Subsection (1) applies to business relationships that have a "scope"—*ongoing* relationships, in other words, as opposed to contracts to create a particular work. Petitioners' agreement with respondent was plainly a "commission," in the ordinary sense of the word. It is that ordinary sense of the word that governs. "Third World America" is accordingly subject exclusively to Subsection (2) and is not a work made for hire.

B. The history of the work-made-for-hire provisions confirms the meaning of the text. At the time the provisions were drafted, the existing work-made-for-hire statute, Section 26 of the 1909 Act, had been applied by the courts only to works prepared by regular, salaried employees; it had never been applied to commissioned works. Not surprisingly, therefore, the parties who participated in the revision process understood the proposed text of Subsection (1), which was based on Section 26, to apply only to formal employment relationships. What is more, the development and drafting history of Subsection (2), which governs commissioned works, is squarely at odds with petitioners' view of the statute. That history shows that Congress deliberately narrowed the class of commissioned works that could be treated as works made for hire to nine specific categories; it did not intend to confer work-made-for-hire status on *other* kinds of commissioned works simply because they may have been prepared under close supervision. Moreover, the history shows that Congress selected the nine categories in Subsection (2) because it believed that those specific kinds of commissioned works are typically created with *more*, not *less*, supervision by the hiring party, and that they should therefore be governed by the same legal standards as works prepared by regular, salaried employees.

C. Finally, petitioners' construction of the work-made-for-hire provisions would inject unnecessary uncertainty into ordinary copyright transactions. Under petitioners' test, the determination of copyright ownership would depend upon whether the hiring party actually exercised supervision and control over the creative process. Such an assessment, however, could not be made until long after the parties had negotiated for the creation of a particular work. Petitioners' interpretation would thus render rational copyright planning more difficult in any transaction involving independent contractors.[5]

ARGUMENT

"THIRD WORLD AMERICA" IS NOT A WORK MADE FOR HIRE UNDER THE COPYRIGHT ACT OF 1976, AND RESPONDENT ACCORDINGLY OWNS THE COPYRIGHT IN IT

A. The Language and Structure Of The Statute Demonstrate That "Third World America" Is Governed Exclusively By Subsection (2) And Is Therefore Not A Work Made For Hire

In copyright cases, as elsewhere, "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' " *Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985) (footnote omitted). Accord *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The text and structure of the

[5] In a January 25, 1983 letter to Senator Cochran, reproduced by petitioners as an appendix to their brief (at 1a-12a), the Copyright Office offered "tentative preliminary views" that appear to be consistent with the Second Circuit's decision in *Aldon Accessories* (see Br. 6a). The Copyright Office expressed similar views in an August 21, 1986 letter to Senator Cochran. Those views did not reflect, however, a detailed examination of the work-made-for-hire provisions. Having now conducted such an examination, the Copyright Office has concluded that the analysis of Subsections (1) and (2) articulated by the Ninth Circuit in the *Dumas* case is correct. For that reason, the Copyright Office has also withdrawn Circular R-9 (Dec. 1985), cited by petitioners in their brief (at 42-43 n. 21).

work-made-for-hire provisions make clear that "Third World America" is a "commissioned" work, subject to Subsection (2), and not the work of an "employee within the scope of his or her employment" under Subsection (1). Because "Third World America" does not meet the work-made-for-hire requirements of Subsection (2), respondent owns the copyright in the statue.

1. Subsection (2) applies to "specially ordered or commissioned" works, and it extends work-made-for-hire status whenever such a work falls into one of nine specific categories and there is a written instrument, signed by the parties, providing that the work shall be considered a work made for hire. The words "specially ordered" and "commissioned" should be given their ordinary meaning. To "commission" someone is "to appoint [him] to a certain task, mission, function or duty." *Webster's Third International Dictionary of the English Language* 457 (1986). "In the ordinary case where one person is requested by another to prepare a copyrightable work, a commissioned relationship exists." 1 *Nimmer on Copyright* § 5.03[B][2][d], at 5-26 (1988) (footnote omitted). Thus, "[a]s the phrase implies, a work prepared on special order or commission is one created upon the order or request of a party other than the author." Angel & Tannenbaum, *Works Made For Hire Under S.22*, 22 N.Y.L. Sch. L. Rev. 209, 227 (1976).

Unlike the relationship between "employer" and "employee," a "commissioned" relationship is defined by a particular project. As in the present case, the creator may have had no prior business relationship with the commissioning party; rather, his contract with the commissioning party is a contract to accomplish a particular task. By contrast, Subsection (1), which extends work-made-for-hire status to "a work prepared by an employee within the scope of his or her employment," covers business relationships that have a "scope." Thus, Subsection (1) applies to *ongoing* relationships, involving a specific stream of services that can be defined as falling "within the scope" of that relationship. Whereas a "commissioned" party contracts to create a particular work, and is otherwise free to create like

works for others, an "employee" within the meaning of Subsection (1) enjoys a formal, continuous obligation to perform services for his employer, who is entitled, for an agreed-upon salary, to request his employee to work on whatever projects are consistent with the employment relationship.

2. Petitioners construe Subsection (2) more narrowly. In their view, some commissioned works are *not* subject to Subsection (2); they assert that Subsection (2) applies only to those commissioned works prepared without the "supervision and control" of the hiring party (see Br. 15). But Subsection (2) cannot bear that narrowing construction. The provision applies, by its terms, to any "work specially ordered or commissioned"—not just to those produced without active supervision. Indeed, Subsection (2) does not focus at all on how a project is *executed*—whether or not it is closely supervised. Instead, that subsection looks to how a project is *initiated*: by "special[] order" or "commission."[6] Moreover, Subsection (2) was obviously drafted with considerable care, stating two precise prerequisites for treating "commissioned works" as works made for hire. At the same time, Congress adopted no other criterion according to which "commissioned" works could be deemed works made for hire. There is no warrant for imputing a criterion that Congress did not enact. Cf. *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980); *TVA* v. *Hill*, 437 U.S. 153, 188 (1978); *Aaron* v. *SEC*, 446 U.S. 680 (1980).

Correspondingly, petitioners construe Subsection (1) more broadly than we do. In their view, Subsection (1) applies not only to works created by regular, salaried employees, but also to commissioned works that have been produced under the supervision of the hiring party. Again, the language will not bear the weight petitioners place on it. Unlike Subsection (2), Subsection

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[6] The text of Subsection (2) suggests, if anything, that the commissioning party may quite often exercise close supervision over the projects covered by that provision. The subsection applies to "specially" ordered works. One way in which a commissioning party may place a "special" order is to state what he wants created in "starkly specific detail" (Pet. Br. 15), and thereafter to monitor its production closely.

(1) does not purport to cover commissioned works at all. And while the word "employee" may arguably be stretched to encompass a person who works under another's control, Subsection (1) does not address works prepared by "employees"; it addresses works prepared by employees "within the scope of [their] employment." That additional language—language that petitioners never address—makes it clear that Subsection (1) covers business relationships that involve a "scope" of services. It does not cover contracts to execute a discrete project.

3. When the plain meaning of the provisions is honored, it is clear that "Third World America" is not a work made for hire. Petitioners requested respondent to create a particular work of art. The parties enjoyed no prior business relationship, nor did they have any relationship thereafter. The only obligation respondent bore was to complete his portion of the statue so that petitioners could display the statue during the Christmas Pageant. In short, petitioners "commissioned" respondent to create a work.[7] "Third World America" is therefore covered by Subsection (2), and not by Subsection (1). Since sculpture is not one of the nine categories of works listed in Subsection (2), and since in any event there was no written agreement between the parties, "Third World America" cannot be deemed a work made for hire. Respondent therefore owns the copyright in the statue.

[7] Indeed, petitioner Synder testified that after resolving to participate in the Christmas Pageant, CCNV "decided to go forward and commission * * * a statue" (7/25/86 Tr. 8). In fact, Snyder and his trial counsel repeatedly used the term "commission" to describe CCNV's relationship with respondent (7/25/86 Tr. 9, 47; 2/2/87 Tr. 34, 38, 39, 40, 43; 2/6/87 Tr. 262). And in issuing a preliminary injunction in this case, the district court found that "Third World America" was "commissioned by CCNV and made on commission by the artist" (7/25/86 Tr. 49). See also 7/25/86 Tr. 15 (describing the "commission" to build the base for the statue); 2/2/87 Tr. 142 (testimony of James Earl Reid).

B. The Legislative History of The Work-Made-For-Hire Provisions Confirms The Plain Meaning Of The Text

1. The work-made-for-hire provisions were formulated between 1961 and 1966, in an extensive revision process in which the Copyright Office took the lead role, and in which various affected interests expressed their particular views.[8] Both "the content of the pre-legislative dialogue and the context in which it occurred indicate that by using the term 'employees' the parties meant to limit works made for hire under [Subsection (1)] of the definition to works created by a salaried worker in a long-term position." Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 890 (1987) (footnotes omitted).

At the time that the work-made-for-hire provisions were being considered, the existing work-made-for-hire provision, Section 26 of the 1909 Copyright Act, 17 U.S.C. 26 (1976 ed.), provided simply that "the word 'author' shall include an employer in the case of works made for hire." Although the statute did not define "employer" or "work made for hire," the case law under Section 26 had up to that time applied the work-made-for-hire doctrine solely in cases involving regular, salaried employees.[9] Borge Varmer's 1958 study of the work-made-for-hire doctrine, which he prepared for the Copyright Office in

[8] This Court observed in *Mills Music* that the Copyright Office assumed central responsibility for the development of the 1976 Act, including "authorizing a series of 34 studies on major issues of copyright law"; "conduct[ing] numerous meetings with representatives of the many parties that the copyright law affected"; "issu[ing] a preliminary draft revision bill"; "submitt[ing] [a] 1965 draft revision bill"; and "prepar[ing] a supplementary report to accompany the 1965 draft revision bill" (469 U.S. at 159-160).

[9] In light of the origin of Section 26, that is hardly surprising. As petitioners correctly note, Section 26 "effectively codified" (Br. 18-19 n.6) this Court's decision in *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903). There, the Court upheld an employer's claim to the copyright in three chromolithographs produced by formal, salaried employees (see 188 U.S. at 248). See also Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa. L. Rev. 1281, 1284 (1987) (citing legislative history suggesting that Section 26 was intended to apply solely to works prepared by regular, salaried employees).

connection with the revision process, confirms the point. B. Varmer, *Works Made For Hire And On Commission*, Copyright Office Study No. 13, 86th Cong., 2d Sess. (Comm. Print 1960) ("Varmer 1958 Study"). In that study—which petitioners aptly describe as "[t]he genesis for the 1976 Act's work for hire provisions" (Br. 21)—Varmer examined the text of, and decisions interpreting, Section 26. He found that while the courts had not articulated a general definition of works made for hire, "all the cases have involved salaried employees who received either a fixed salary or a minimum salary plus commission" (Varmer 1958 Study, at 130). "[I]t may be concluded," he wrote, "that section 26 refers only to works made by salaried employees in the regular course of their employment" (*ibid.*).[10]

By contrast, at the time of the copyright revision the courts had not applied Section 26 or the work-made-for-hire doctrine to commissioned works. Instead, the courts had developed and applied a common law presumption that a commissioned party impliedly agrees to convey the copyright, along with the work itself, to the hiring party. The leading case was the Second Circuit's decision in *Yardley* v. *Houghton Mifflin Co.*, 108 F.2d 28 (1939), cert. denied, 309 U.S. 686 (1940). There, the court of appeals held that the City of New York owned the copyright in a mural that it had commissioned an artist to paint on the wall of a high school auditorium. In reaching that result, the court did not apply Section 26, nor did it conclude that the City was somehow the artist's "employer."[11] Instead, it "indulged" the "presumption" that "[w]hen an artist accepts a commission to paint a picture for another for pay, he sells not only the picture but also the right to reproduce copies thereof unless the copyright is reserved to the artist by the terms, express or implicit, of the contract" (108 F.2d at 30-31).[12]

2. It was in that legal context—in which work-made-for-hire status had been conferred only on works created by regular, salaried employees—that the revision of the work-made-for-hire definition took place. Not surprisingly, therefore, the Copyright Office, in its initial legislative proposal, recommended that *no* commissioned works be included within the ambit of the proposed work-made-for-hire provisions. The 1961 Report of the Register noted that "[t]he courts * * * ha[d] not generally regarded commissioned works as 'made for hire' " (*Copyright Law Revision, Report of the Register of Copyrights on the*

[10] Petitioners acknowledge (Br. 21-22, 27 n.10) the Varmer study, but they contend that "[n]one of the cases cited by Varmer * * * considered the question of whether an employment relationship exists where the artist is subject to supervision and control but does not receive a 'salary' " (Br. 27 n.10). This ignores the fact that Varmer purported to have examined all of the cases decided under Section 26; petitioners do not suggest that he overlooked any that might have been helpful to their interpretation of the work-made-for-hire doctrine. The fact that no such cases had been reported confirms Varmer's conclusion that Section 26 was not intended to apply absent a formal employment relationship. Petitioners also quote a passage from the Varmer study in which Varmer explained that works created by employees are treated as works made for hire, whereas commissioned works are not, because "an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor" (Br. 21 (citation and emphasis omitted)). It is doubtless true, as Varmer observed, that as a general matter an "employee" is subject to closer supervision than is a commissioned artist. But Varmer did *not* state, as petitioners mistakenly assert (Br. 27 n.10), that any artist whose efforts are subject to control by a hiring party is therefore an "employee" of that hiring party for purposes of the work-made-for-hire doctrine.

[11] The *Yardley* court did not cite the work-made-for-hire provision in the 1909 Act. What is more, the court went on to hold that the artist's executor, and not the City, had the right to renew the copyright under Section 24 of the 1909 Act, 17 U.S.C. 24 (1976 ed.)—which extended the right to renew only to "authors" or their family and executors. The court of appeals thereby acknowledged, albeit implicitly, that although a commissioned party is presumed to transfer his initial copyright to the hiring party, he retains formal authorship, and thus cannot be characterized as an "employee" within the meaning of the work-made-for-hire provision. Accord *Dumas* v. *Gommerman*, No. 87-6542 (9th Cir. Jan. 13, 1989), slip op. 300 n.4.

[12] Cases following *Yardley* articulated the same presumption. See, *e.g.*, *Lin-Brook Builders Hardware* v. *Gertler*, 352 F.2d 298, 300 (9th Cir. 1965); *McKay* v. *Columbia Broadcasting System, Inc.*, 324 F.2d 762, 763 (2d Cir. 1963); *Official Aviation Guide Co.* v. *American Aviation Associates, Inc.*, 150 F.2d 173, 178 (7th Cir.), cert. denied, 326 U.S. 776 (1945); *Grant* v. *Kellogg Co.*, 58 F. Supp. 48, 51 (S.D.N.Y. 1944), aff'd, 154 F.2d 59 (2d Cir. 1946). See also Varmer 1958 Study, at 130. None of those cases held that a commissioned artist is an "employee" for purposes of Section 26.

General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 86 (Comm. Print 1961)); and the Copyright Office therefore submitted a Preliminary Draft Bill in 1963 defining "work made for hire" as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission" (*Copyright Law Revision, Part 3, Preliminary Draft For Revised U.S. Copyright Law and Discussions and Comments on the Draft*, at 15 n.11 (1964)).

That proposal met substantial resistance, chiefly from book publishers. Significant for present purposes, however, is the fact that the publishers and their allies uniformly acknowledged that under the Copyright Office's proposal—extending work-made-for-hire status solely to works "prepared by an employee within the scope of the duties of his employment" (now Subsection (1))—only works created by regular, salaried employees could be treated as works made for hire. For example, the American Book Publishers complained that the suggested work-made-for-hire provisions would "include only work done by a salaried employee in the scope of his regular duties, and would exclude works made on special order or commission." *Copyright Law Revision, Part 4, Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2d Sess. 250 (Comm. Print 1964) (Nov. 1963 letter from Dan Lacy, Managing Director, to Register of Copyrights). Similarly, John R. Peterson, representing the American Bar Association, contended that there was no "valid philosophical or economic difference between the situation in which you have a man on a continuing basis of orders which justifies placing him on your payroll, and the situation in which you give him a particular order for a particular job." In Peterson's view, a hiring party may not "have enough work to keep [the creator] on the payroll all the time, yet that work essentially is 'made for hire.' " *Copyright Law Revision, Part 3*, at 260-261. Indeed, to our knowledge, every commentator who has canvassed the legislative history of the 1976 Act has concluded that the participants in the revision debates understood the language in Section (1) to refer solely to regular, salaried employees.[13] As the Ninth Circuit recently explained, " 'plenty of discussion indicates that everyone involved understood the term ["employee"] to mean someone working for an employer in a salaried job, and understood the term to exclude freelance workers completely.' " *Dumas* v. *Gommerman*, No. 87-6542 (Jan. 13, 1989), slip op. 305-306 (emphasis and citation omitted).

Following the initial proposal of the Copyright Office in 1963, the publishers and authors debated the question whether, and to what extent, commissioned works should be added to the proposed work-made-for-hire definition. As petitioners acknowledge, however, the provision governing "employees," which would ultimately be enacted as Subsection (1), "was essentially non-controversial" (Br. 15), and was not further amended during the subsequent debates. See also Br. 28. As far as we can determine, none of the participants in those debates ever suggested that Subsection (1) might be applied to works that are not created by regular, salaried employees.

3. The subsequent development of the commissioned works provision, now Subsection (2), is also fundamentally at odds with petitioners' construction of the statute. That legislative history confirms two central propositions: First, contrary to petitioners' interpretation of Subsection (1), Congress did not intend to confer work-made-for-hire status on otherwise commissioned works that happen to be created under the close supervision of the hiring party. Rather, it carefully limited the kinds of commissioned works entitled to work-made-for-hire status to the nine categories enumerated in Subsection (2). Second and relatedly, Congress did not intend Subsection (2) to apply only to those commissioned works that are created without close supervision by the hiring party. To the contrary, Congress selected the nine categories in Subsection (2) because it was convinced that those particular kinds of commissioned works are

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[13] See, e.g., Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. of the Copyright Soc. of the USA 210, 225-227 (1988) (collecting contemporaneous statements); Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 901 (1987).

typically created *with* close supervision, and therefore should be governed by the same legal principles that apply to works of "employees" under Subsection (1).

a. In urging the Copyright Office to include at least certain kinds of commissioned works within the work-made-for-hire provisions, the publishers contended that there are "a great many works which for practical reasons are prepared 'on special order or commission' but which by their nature deserve to be treated as 'works made for hire' " (*Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill,* 89th Cong., 1st Sess. 66-67 (Comm. Print 1965)). The publishers acknowledged that "there are many works, such as serious music and choreography, that are written 'on special order or commission' but that should not be regarded as 'works made for hire' " (*id.* at 67). Nevertheless, they reasoned that other kinds of commissioned works "are prepared by freelance authors at the instance, direction, and risk of a publisher or producer" (*ibid.*).[14] The publishers argued that the latter categories of works—which, in their view, included translations, maps, illustrations in books, front matter and appendixes, contributions to dictionaries and encyclopedias, and parts of motion pictures (*ibid.*)—should be governed by "the same legal and policy considerations dictating special treatment of 'works made for hire' " (*ibid.*).

The publishers' concerns were addressed in the 1964 revision bill. That bill provided in pertinent part that "[a] 'work made for

[14] For example, the textbook publishers contended that in the case of certain reference and collective works, such as maps, atlases, and encyclopedias, "[t]he publisher is in reality the creator • • • and hires individuals to prepare segments of it under its supervision and control (very similar to the creation of a motion picture)." *Copyright Law Revision, Part 3*, at 340-341 (1964) (letter from Ellis Arnall, Esq., on behalf of American Textbook Publishers Institute, to Register of Copyrights). Similarly, Bella Linden, attorney for the American Textbook Publishers Institute, explained that reference works such as encyclopedias and maps "are created as composite works where the publisher participates creatively and orders and commissions segments • • •." *Copyright Law Revision, Part 5, 1964 Revision Bill with Discussion and Comments*, 89th Cong., 1st Sess. 149 (Comm. Print 1965).

hire' is a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire." S. 3008, H.R. 11947, H.R. 12354, 88th Cong., 2d Sess. (1964) (reproduced in *Copyright Law Revision, Part 5, 1964 Revision Bill with Discussion and Comments,* 89th Cong., 1st Sess., 9, 31 (Comm. Print 1965)). But that bill—which would have extended work-made-for-hire status to all categories of commissioned works, whenever there was a written agreement—"drew even heavier fire from the representatives of authors' organizations, who argued that an author could easily be induced to sign a form contract stating that his work is 'made for hire,' and that ordinary book publication contracts, signed before the author has completed the work and calling for an advance against royalties, could be converted into 'employment agreements' as as matter of course" (*Copyright Law Revision, Part 6*, at 67).

"In an effort to reconcile these conflicts" (*Copyright Law Revision, Part 6*, at 67), the competing parties reached a "carefully worked out compromise aimed at balancing legitimate interests on both sides" (*id.* at 66). That compromise, whose terms were embodied in a joint memorandum (see *Copyright Law Revision: Hearings on H.R. 4347 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 134 (1965)), was reflected in the 1965 revision bill. That bill defined "work made for hire" in the same form, and nearly the same terms, as the bill that Congress would ultimately approve, 11 years later, in the Copyright Act of 1976:

> (1) a work prepared by an employee within the scope of his employment; or
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

The 1965 bill thus extended work-made-for-hire status to those categories of commissioned works—but only those categories—that are ordinarily prepared "at the instance, direction, and risk of a publisher or producer" (*Copyright Law Revi-*

sion, Part 6, at 67). In addition, the Register of Copyrights made clear that under the 1965 bill only the "four special cases specifically mentioned" could be treated as works made for hire, and only if there is a written agreement. "Other works made on special order or commission," the Register explained, "would not come within the definition." *Id.* at 67-68.

In 1966, Congress drafted a revised bill that expanded the categories of commissioned works contained in Subsection (2) to include "a compilation," "an instructional text," "a test," and "an atlas." See H.R. Rep. No. 2237, 89th Cong., 2d Sess. 116 (1966). In the accompanying report, the House, approving the language of the 1965 Register's supplementary report, reiterated that the work-made-for-hire provisions were " 'a carefully worked out compromise aimed at balancing legitimate interests on both sides' " (*id.* at 114). The House noted that the status of commissioned works had "been a continuing issue" (*id.* at 115). On the one hand, the House stated, "some commissioned works concededly should not be regarded as made for hire" (*ibid.*); in other cases, however, "the distinction between works made for hire or on commission is a purely technical one" since "in either case the work is prepared at the employer's initiative and risk and under his direction" (*ibid.*). "The problem," the House explained, "is how to draw a statutory line between those works written on special order or commission that should be considered as works made for hire, and those that should not" (*ibid.*). Although the 1965 revision bill had "moved in the direction of a solution" (*ibid.*), the House noted that the affected parties had reached a further "compromise • • • aimed at adding additional categories to the four types of commissioned work dealt with specially in the definition of works made for hire" (*id.* at 116). The House agreed to incorporate that compromise.

With the single addition of "answer material for a test," the 1976 Act, as enacted, contained the same definition of works made for hire as did the 1966 revision bill, and it contained the same structure and nearly the same terms as the 1965 bill. In the accompanying report, the House reiterated that "[t]he basic

problem is how to draw a statutory line between those works written on special order or commission that should be considered as 'works made for hire' and those that should not" (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976)). It also stated plainly that "[t]he definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances" (*ibid.*).

b. Petitioners' analysis of the work-made-for-hire provisions cannot be squared with this history. Plainly, Congress did not intend to permit any and every kind of commissioned work to be deemed a work-made-for-hire, simply because it may have been prepared under the supervision of the hiring party. To the contrary, Congress chose *particular* categories of commissioned works to include in Subsection (2), and it refused to expand that set any further.[15] Moreover, Congress's reasons for choosing those particular categories belie petitioners' supposition that Subsection (2) applies only to unsupervised commissioned works. Indeed, just the opposite is true: Congress selected the

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[15] For example, the 1969 Senate revision bill proposed that Subsection (2) be expanded to include works specially ordered or commissioned for use "as a photographic or other portrait of one or more persons." The Copyright Office objected to that proposal, explaining that "[t]he addition of portraits to the list of commissioned works that can be made into 'works made for hire' by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not intended to be treated as 'employees' under the carefully negotiated definition in section 101." *Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill*, ch. XI, at 12-13 (1975). The Copyright Office thus viewed Subsection (2) of the work-made-for-hire provisions as a closed set, embracing only those categories of "specially ordered or commissioned" works that deserved to be treated, as a legal matter, in the same way that works of an "employee" were treated under Subsection (1). Photographs, the Copyright Office concluded, were not intended to be included within that closed set—even if, in a particular case, the photographer worked under the close supervision of the hiring party. The proposal to add photographs to Subsection (2) was ultimately abandoned in Congress.

nine categories in Subsection (2) because it was persuaded that, like the work of an "employee acting within the scope of his employment," those categories of commissioned works, but only those categories, are typically "prepared at the employer's initiative and risk and under his direction" (H.R. Rep. No. 2237, *supra*, at 115).

In effect, if not by design, petitioners propose to unravel Congress's " 'carefully worked out compromise aimed at balancing legitimate interests on both sides' " (H.R. Rep. No. 2237 at 114). Under their approach, *any* commissioned work can be a work made for hire, so long as the hiring party has controlled its production. But the legislative history shows that when Congress was persuaded that a type of work is typically prepared under close supervision, it included that work as a distinct category within Subsection (2). Congress "dr[e]w a statutory line" (H.R. Rep. No. 2237 at 115) at nine categories. Petitioners have no warrant for revising that congressional design.[16]

3. Petitioners nevertheless contend that by the time Congress enacted the Copyright Act of 1976, there was a line of cases holding that under Section 26 of the 1909 Act—the old work-made-for-hire provision—an employment relationship

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[16] As one commentator has summarized the point:

> The legislative history shows that Congress intended that only a commissioned work in one of the enumerated categories could become a work made for hire. Nonenumerated commissioned works may not become works made for hire, even by a written agreement. Whether a commissioned work falls under the works-made-for-hire provision does not depend on whether the commissioner or the independent contractor is the true creator. Congress simply enumerated nine types of works that appeared to it to be created under conditions very similar to employment. • • • In structuring the provision this way, Congress mirrored the policy applied to works created by employees: to reward the party at whose economic risk the work was prepared.

Note, *The Creative Commissioner: Commissioned Works Under The Copyright Act of 1976*, 62 N.Y.U. L. Rev. 373, 385-386 (1987) (footnotes omitted). Accord Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa. L. Rev. 1281, 1295 (1987); Angel & Tannenbaum, *Works Made for Hire Under S. 22*, 22 N.Y. L. Sch. L. Rev. 209, 236-237 (1976).

exists whenever the hiring party has exercised control or supervision over the artist's work (Br. 18-19). Petitioners surmise that Congress must have intended to adopt that line of cases when it enacted Subsection (1), since "[n]owhere in the 1976 Act or in the Act's legislative history d[id] Congress state that it intended to jettison the control standard or otherwise to reject the pre-Act judicial approach to identifying a work for hire employment relationship" (Br. 20). That contention is mistaken for two reasons.

First, petitioners do not point to any evidence that Congress actually intended to enact the judicial definition of "employment" to which they advert.[17] Petitioners rely, instead, on Congress's failure "to jettison" that definition. But ordinarily "Congress' silence is just that—silence" (*Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987));[18] and silence in the legislative history cannot impeach the plain meaning of Subsection (2) (see *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 6; *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980)).

Second and in any event, petitioners' account of the legislative history is mistaken. As we showed above, the structure of the work-made-for-hire provisions was fully developed by 1965, and its text was agreed upon in essentially final form by

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[17] Indeed, "[t]here is no indication that anyone involved in copyright revision later became aware of the line of cases expanding the work made for hire doctrine." Litman, *supra*, 72 Cornell L. Rev. at 901 (footnote omitted). As amici curiae Computer and Business Equipment Manufacturers Association, et al. concede, "[n]owhere do the House and Senate Reports • • • even refer to" this line of cases (Br. 10).

[18] Congress's failure *explicitly* to incorporate the judicial construction of "employment" is particularly telling, since in other respects Congress made clear when it intended to embrace existing case law. See, *e.g.*, H.R. Rep. No. 1476, at 121 ("There is • • • no need for a specific statutory provision concerning the rights and duties of the coowners [*sic*] of a work; court-made law on this point is left undisturbed"). Accord *Dumas* v. *Gommerman*, slip op. 313-314. Moreover, in other instances, Congress clearly altered preexisting case law *without* expressly signalling in the legislative reports that it was doing so. See, *e.g.*, Litman, *supra*, 72 Cornell L. Rev. 901 n.275 (discussing provision regarding automatic vesting of copyright upon fixation).

1966.[19] As of that time, the courts had applied the work-made-for-hire doctrine exclusively in cases involving regular, salaried employees, and had not included commissioned works within the ambit of Section 26 of the 1909 Act.[20] It was not until 1966 that the Second Circuit, in a line of cases beginning with *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565, brought commissioned works within the ambit of the term "employer" under the 1909 work-made-for-hire doctrine.[21] Accord *Murray* v. *Gelderman*, 566 F.2d 1307 (5th Cir. 1978) (applying 1909 Act); *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), cert. denied, 424 U.S. 955 (1976); *Picture Music, Inc.* v. *Bourne, Inc.*, 457 F.2d 1213 (2d Cir.), cert. denied, 409 U.S. 997 (1972). That conclusion, which the *Yardley* court had rejected (see pages 14-15 & n.11, *supra*), was entirely new law. As the Ninth Circuit has recently explained, the *Yardley* presumption "was gradually expanded into a presumption that anyone who paid an artist to create a

[19] Cf. *Mills Music*, 469 U.S. at 160-161 (footnotes omitted) ("[a]lthough additional hearings were held in subsequent sessions, and revision bills were submitted to Congress in each term for the next 10 years, discussion over the termination provisions • • • was essentially completed at this time. Congress enacted the termination provisions • • • in the 1976 Act in virtually the same form as they appeared in the 1965 draft revision bill").

[20] As one commentator has put it, "[i]n 1965, when the parties reached [their] compromise, courts had not yet extended the scope of works made for hire to include commissioned works. That particular line of cases developed in the decade to follow." Litman, *supra*, 72 Cornell L. Rev. at 890 n.215.

[21] In *Brattleboro*, a newspaper contended that its copyright in certain advertisements had been infringed by a direct mail circular that published the same advertisements at the request of the advertisers. The court of appeals rejected the newspaper's claims, holding that under Section 26 of the 1909 Act the newspaper did not own the copyright in the advertisements. The court noted the presumption under *Yardley* that "the copyright shall be in the person at whose instance and expense the work is done" (369 F.2d at 567), and it perceived no reason why that presumption should not be extended to a situation where "the parties bear the relationship of employer and independent contractor" (*id.* at 568). Rather than presuming that the contractor conveyed the copyright, however, the court presumed that the hiring party was actually the "employer" for purposes of the work-made-for-hire doctrine.

copyrightable work was the statutory author under the work for hire doctrine." *Dumas* v. *Gommerman*, No. 87-6542 (Jan. 13, 1989), slip. op. 300 (footnote omitted).

The fact remains, however, that by as late as 1966—at which point the revision of the work-made-for-hire provisions was essentially complete—the courts had applied Section 26 of the 1909 Act only to works created by regular, salaried employees, and never to works made on commission. Petitioners' analysis of the 1976 Act—which rests on the premise that Congress failed "to jettison" the *Brattleboro* line of cases—simply does not hold up. Congress could not have "jettisoned" a line of cases that had not yet been decided when the revised work-made-for-hire provisions were formulated.[22]

C. Petitioners' Construction of the Work-Made-For-Hire Provisions Would Subject Copyright Negotiations To Excessive Uncertainty

The drafters of the work-made-for-hire provisions "intended the definition to be tailored to the realities of the copyright

[22] There is another, more general reason why it is appropriate in this case to regard 1965-1966, rather than 1976, as the relevant period for fixing legislative intent. The Copyright Act of 1976 was largely the product of "compromise between competing interests" and most of the Act, including the work-made-for-hire provisions, "was drafted by the Copyright Office, which is itself an arm of Congress" (*Mills Music*, 469 U.S. at 182 n.6 (White, J., dissenting)). "The legislative materials disclose a process of continuing negotiations among various industry representatives, designed and supervised by Congress and the Copyright Office and aimed at forging a modern copyright statute from a negotiated consensus." Litman, *supra*, 72 Cornell L. Rev. at 862. Here, as in *Mills Music* (see 469 U.S. at 160-161), the relevant statutory provisions were fully negotiated between the parties by about 1965, and Congress thereafter did little or nothing to upset the compromise reached by the competing factions. Indeed, the enacted provisions reflect exactly the compromise struck by the publishers and authors ten years earlier. Petitioners' construction of the work-made-for-hire provisions, which reads into them a line of judicial decisions that could not possibly have been before the various parties during the relevant time period, is for that reason unfaithful to the essentially "contractual" nature of the compromises adopted in Subsections (1) and (2). Cf. Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 46 (1984).

marketplace." *Dumas* v. *Gommerman,* slip op. 318 n.18. In a rational "copyright marketplace," parties negotiate with an expectation that one or the other of them will clearly be the owner of the copyright in the completed work. Armed with that knowledge, the parties can then more readily settle on the relevant contractual terms—such as the price for the work, and who shall have rights to future reproduction when the work is completed and ready for exploitation.

Petitioners' construction of the work-made-for-hire provisions makes such rational planning much more difficult. Because the "supervision and control" test turns on whether the hiring party has closely monitored the creation process, the parties cannot know until late in the day whether a work will ultimately be deemed to be one for hire under Subsection (1). Indeed, the determination whether the hiring party "actually sufficiently supervised and directed" the production process (*Aldon Accessories,* 738 F.2d at 552) cannot be made with confidence until the production process has been completed. Thus, under petitioners' approach "buyers and sellers will have to predict in advance whether the buyer's 'actual control' over a given work will make it the 'author.' If they guess incorrectly, their reliance on 'work for hire' or an assignment may give them a copyright interest that they did not bargain for." *Easter Seal Society* v. *Playboy Enterprises,* 815 F.2d 323, 333 (5th Cir. 1987). Accord *Dumas* v. *Gommerman,* slip op. 314.[23]

The present case illustrates the kind of uncertainty that petitioners' approach entails. In making its determination that respondent was an "employee" within the meaning of Subsection (1), the district court relied on the fact that during the creative process respondent "was visited on a number of occasions by various CCNV members, ostensibly to check on his

[23] Moreover, petitioners' interpretation "leaves the door open for hiring parties, who failed to get a full assignment of copyright rights from independent contractors falling outside the subdivision (2) guidelines, to unilaterally obtain work-made-for-hire rights years after the work has been completed as long as they directed or supervised the work, a standard that is hard not to meet when one is a hiring party." Hamilton, *supra,* 135 U. Pa. L. Rev. at 1304. Accord Hardy, *supra,* 35 J. of the Copyright Soc. at 250.

progress" (Pet. App. 33a), and that petitioners made their final payment to respondent "only when satisfied, upon delivery, that the statu[e] did, indeed, convey the message they had intended for it" (*id.* at 35a). The court also observed that petitioners had "directed enough of [respondent's] effort to assure that, in the end, he had produced what they, not he, wanted" (*ibid.*). And at trial, petitioners found it necessary to establish that they had made 10-15 trips to Baltimore during the creative process (7/25/86 Tr. 12); that they had told respondent what materials to purchase as he was sculpting the work (*id.* at 45); that they had instructed respondent to alter the posture of the figures in the statue (2/2/87 Tr. 25-26); and that they had prevailed in all of the 3-5 disagreements with respondent concerning the creation of the statue (*id.* at 29).

Petitioners' "supervision and control" test inevitably turns on such after-the fact considerations.[24] By contrast, the Ninth Circuit's interpretation, which we endorse, is susceptible to ready application at the outset of the negotiation process. If the creator is a regular, salaried employee of the hiring party, then the work is governed by Subsection (1); if the creator is commissioned to prepare a particular project, and otherwise has no formal, ongoing relationship to the hiring party, then the work is governed by Subsection (2). The parties will know where they

[24] The Second Circuit's decision in *Aldon Accessories,* on which petitioners prominently rely (Br. 20, 30, 32 n.13, 33), also illustrates the speculative nature of the "supervision and control" test. There, the court of appeals concluded that certain Japanese and Taiwanese artists who had created the figurines ordered by the plaintiffs were "employees" under Subsection (1) because "[t]here was evidence that [plaintiffs] actively supervised and directed the[ir] creation" (738 F.2d at 553). The court relied on the fact that one of the plaintiffs had "stood over the artists and artisans at critical stages of the process, telling them exactly what to do" (*ibid.*)—including, " 'changing shapes, adjusting attitudes and proportions' " and instructing the artists to " 'put the leg this way, make this proportion, put the head this way, make the hair that way' " (*id.* at 550). The cases that have followed *Aldon Accessories* turn on the same after-the-fact analysis. See, *e.g., Nadel & Sons Toy Corp.* v. *W. Shaland Corp.,* 657 F. Supp. 133, 135 (S.D.N.Y. 1987); *Sandwiches, Inc.* v. *Wendy's Int'l, Inc.,* 654 F. Supp. 1066, 1073 (E.D. Wis.), appeal dismissed, 822 F.2d 707 (7th Cir. 1987); *Iris Arc* v. *S.S. Sarna, Inc.,* 621 F. Supp. 916, 920 (E.D.N.Y. 1985).

stand at the outset, and they will not be able to alter the original bargain by after-the-fact supervision of the creative process. That approach, moreover, will not only facilitate the process of contractual negotiation, but should also minimize the need for highly fact-bound and unpredictable litigation. And, not least of all, it will give the work-made-for-hire provisions their plain and evident meaning.[25]

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[25] Under 17 U.S.C. 105, a "work of the United States Government"—which is defined as "a work prepared by an officer or employee of the United States Government as part of that person's official duties" (17 U.S.C. 101)—is not available for copyright protection. Petitioners correctly note (Br. 34) that Congress intended "works of the United States Government" to be construed in the same way as "works made for hire" (see H.R. Rep. No. 1476, at 58). From that premise, petitioners contend that "an overly restrictive interpretation of the term 'employee' in the work for hire provisions" would likewise narrow the scope of the parallel language in Section 105 and thereby impair the prospect for the "broadest publicity for matters of government" (Br. 35). In fact, however, Congress itself imposed a "restrictive" interpretation on the reach of Section 105, by explicitly stating that Section 105 does not apply to "work[s] prepared under U.S. Government contract or grant" (H.R. Rep. No. 1476, at 59). That restriction limits the scope of Section 105 precisely to parallel the scope of Subsection (1), as we have construed it. Just as works "of an employee within the scope of his or her employment" do not encompass commissioned works, works "prepared by an officer or employee of the United States Government as part of that person's official duties" do not encompass contracts to complete a particular project.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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